

## **MINUTES**

### **MONTANA SENATE 58th LEGISLATURE - REGULAR SESSION**

#### **COMMITTEE ON JUDICIARY**

**Call to Order:** By **CHAIRMAN DUANE GRIMES**, on February 10, 2003 at 10:00 A.M., in Room 303 Capitol.

#### **ROLL CALL**

**Members Present:**

Sen. Duane Grimes, Chairman (R)  
Sen. Dan McGee, Vice Chairman (R)  
Sen. Brent R. Cromley (D)  
Sen. Aubyn Curtiss (R)  
Sen. Jeff Mangan (D)  
Sen. Jerry O'Neil (R)  
Sen. Gerald Pease (D)  
Sen. Gary L. Perry (R)  
Sen. Mike Wheat (D)

**Members Excused:** None.

**Members Absent:** None.

**Staff Present:** Judy Keintz, Committee Secretary  
Valencia Lane, Legislative Branch

**Please Note.** These are summary minutes. Testimony and discussion are paraphrased and condensed.

**Committee Business Summary:**

Hearing & Date Posted: SB 328, SB 329, 2/6/2003  
Executive Action: SB 281, SB 283

**HEARING ON SB 328**

**Sponsor:**           **SEN. JEFF MANGAN, SD 23, GREAT FALLS and BLACK EAGLE**

**Proponents:**       **Kelly Rosenleaf, Child Care Resources  
Barb McHugh (?), Director of the Four C's Program  
in Butte**

**Opponents:**       **Scott Crichton, Executive Director of the ACLU**

**Opening Statement by Sponsor:**

**SEN. JEFF MANGAN, SD 23, GREAT FALLS and BLACK EAGLE**, introduced SB 328. He remarked he introduced a bill last session to license drop-in child care. It passed as a permissive statute for those entities. None of the entities have become licensed. Drop-in child care is referred to as irregular care in the code. Most people assume these entities are licensed and regulated by the state. He has introduced two bills this session. One sets up licensing for the entities and the other (SB 328) provides that the employees have background checks. It is important to ensure that sex offenders are not working with our most vulnerable population, especially since most people believe the entities are licensed and regulated. He has asked **Ms. Lane** to review current statutes in regard to fingerprinting. He is not sure fingerprinting is necessary, but a name background check should be made. One of the first bills this Committee heard provided for background checks for lottery employees. This bill passed with no problems. He suggested that our children are more important than a scratch off ticket or the power ball.

**Proponents' Testimony:**

**Kelly Rosenleaf, Director of Child Care Resources**, remarked that her organization helps families find childcare and they help low income families pay for childcare and provide training for the childcare workforce in Missoula, Mineral and Ravalli Counties. There are similar organizations throughout the state who perform these services on contract with the Department of Public Health and Human Services. They support SB 328. In Missoula, there are several large drop-in childcare centers which are considered to be an essential part of the fabric and service delivery system for childcare for families. Many families work irregular schedules which involve evenings and weekends. It is difficult for these families to obtain childcare in a regularly licensed center because these entities have established ratios and are not able to have children for irregular hours. Many families use drop-in facilities as a routine part of their childcare system.

The staff in those facilities have very important jobs nurturing small children during their most vulnerable early brain development years. It is a minimal standard to see that the people working in those facilities are not convicted of violent assaults, assaults against children, drug sales, etc.

**Barb McHugh, Director of the Four C's Program in Butte**, remarked that parents have the false sense that these facilities are regulated and the staff is able to provide a safe and sound environment. Senate Bill 328 provides a minimal step to assure the people who are caring for our children are protected from harm.

**Opponents' Testimony:**

**Scott Crichton, Executive Director of the ACLU**, raised a concern about using fingerprinting as a condition of employment. He does not dispute the importance of having a safe childcare facility but he is not convinced that expanding fingerprinting as a condition of employment is the way to ensure that safety. Members of the bar submit their fingerprints as agents of the court. This is also done by persons involved with the gaming industry and the lottery because they are handling large sums of money. For the last two legislative sessions there were efforts to require fingerprinting as a condition of employment for teachers. Neither session saw those bills pass due to the slippery slope this provides. As an American, a person is innocent until proven otherwise. He questioned who would be paying the fingerprinting fee. If the employer pays this fee, it is necessary to consider how many people are employed and their turnover rate. In a recent case, there were people providing childcare who were questionable as competent parents. Due to lack of enforcement, they continued to operate their childcare facility for four or five months after it was understood they would no longer operate a childcare facility. A criminal background check would not have provided information that these people should not be operating a facility. They would have passed the criminal background check and still been a danger to the children at their facility. It is important to make sure the facilities have a good check and balance within their operations. This would include supervision and operating procedures. It is also important to make sure the children are not isolated with one provider. If fingerprinting is opened for this segment of the workforce, the next legislative session will have another segment of the population who will need to prove they are law abiding citizens in order to obtain employment. This is the wrong direction to go because there are better ways to solve this problem.

**Questions from Committee Members and Responses:**

**SEN. WHEAT** asked **Mr. Crichton** to further explain his comment in regard to better ways to solve this problem. **Mr. Crichton** stated the employer needs to be thorough in investigating references and previous work history. He noted that someone may not be honest in regard to their work history. These matters should be explored in detail. If someone is cleared by the FBI, this person could still abuse and misuse children.

**SEN. WHEAT** maintained a previously convicted child abuser who lied to his or her employer about a previous conviction, would already have been fingerprinted. The background check would identify the person who has lied about his or her background. **Mr. Crichton** agreed the fingerprint check would catch the person in the lie. The laws that have been passed make it virtually impossible for a convicted sex offender to seek employment without there being public notice of their offense.

**SEN. WHEAT** questioned who would conduct the investigation and also who would pay for the investigation. **Becky Seibenaler (sp), Department of Public Health and Human Services (DPHHS)**, explained that under the current regulations governing regulated childcare, they provide name-based background checks through the Department of Justice. This costs \$8.00. If the person has lived out-of-state or comes from a state considered a "closed" state, an FBI fingerprint check is conducted which would cost \$32.00. For the eleven states surrounding Montana, the fee would be \$8.00. The fee is paid by either the applicant or the facility.

**SEN. WHEAT** asked if the **DPHHS** supported SB 328. **Ms. Seibenaler** remarked they support the legislation in regard to child protection but they did have some concerns about the bill. Part of their concern is the enforcement of the bill. Under current law, drop-in facility licensure is permissive. They do not have an enforcement ability if a person shows a crime that is a disqualifier. They can take the license away from the facility but without the enforceability mechanism, the facility could stay in operation. This would result in a referral to the county attorney.

**SEN. WHEAT** questioned whether currently regulated childcare facilities are required to provide information related to their employees. **Ms. Seibenaler** maintained it is a requirement that all staff and support personnel in a day care facility have proper background checks conducted on an annual basis. Under the current statute, drop-in child care is handled under a permissive license. A license may be granted but is not required. Other

day care facilities which are serving more than three or more children on a regular basis, are required to be licensed.

**SEN. CROMLEY** asked for further explanation as to the determination of when a childcare facility would be required to be licensed. **SEN. MANGAN** commented this would be covered by statutory language in the definition of regular childcare. Some licensed centers provide drop-in childcare but these centers are already licensed. A number of facilities across the state provide drop-in childcare that are not required to be licensed or regulated.

**SEN. CROMLEY** questioned why the facilities providing service on a irregular basis were not required to have a license. **SEN. MANGAN** explained that until the last legislative session, there was no requirement for licensure for irregular childcare. He sponsored a bill in the last session which would have provided for mandatory licensure and regulation. There was strong opposition by the caregivers. The bill was changed to be permissive. It was believed the positive aspect of licensure and regulation would prompt the persons providing irregular childcare to obtain a license. This has not happened.

*{Tape: 1; Side: B}*

**SEN. CROMLEY** questioned whether fingerprinting was required for employees of regular childcare facilities. **SEN. MANGAN** commented that was the case in the closed states and the western region. For others there was a name-based background check.

**SEN. CROMLEY** asked for clarification of the language on page 2, line 1 of the bill. **SEN. MANGAN** explained that a current drop-in care provider who applied for the permissive licensure, would need to have their employees undergo the background check.

**CHAIRMAN GRIMES** requested more information in regard to the bill addressing this issue which was brought in the last session. He was concerned that irregular childcare providers had not applied for licenses. **SEN. MANGAN** explained the bill was heard in the Senate Judiciary Committee last session. Several drop-in childcare providers raised concerns with the rules and licensing requirements for regular childcare providers. They were concerned that the regulations would be identical. It was explained that separate regulations would be adopted to meet their needs. These rules have now been adopted. Unfortunately, no one has chosen to be permissively licensed. He has another bill to address this issue.

**SEN. O'NEIL** asked for more information in regard to incidents of children being abused. **Ms. Seibenaler** explained there had been only a few complaints regarding drop-in care facilities. Without the authority to investigate the cases, it has been necessary to turn these cases over to law enforcement. She was unaware of the disposition of these cases.

**SEN. WHEAT** asked whether it was possible to simply have the employer sign a release for information which may be available from having fingerprints taken at some other time or place. **Ms. Seibenaler** explained that under the currently regulated programs it was necessary for a release of information to be signed for the Department to obtain a name-based background check.

**SEN. WHEAT** commented if a person is required to sign a release and has been fingerprinted in the past, this information would be discovered without the necessity of another fingerprint check. **Ms. Seibenaler** explained if the person attested they had in fact been fingerprinted, it would still be necessary to fingerprint again for the FBI check unless the previous party was willing to provide the fingerprint card.

**SEN. WHEAT** questioned how often it would be necessary to rely on fingerprints for a background check. **Ms. Seibenaler** clarified the reason they performed the FBI background check for regulated childcare providers is for the employees who have worked in states considered closed. The state they resided in will not release the background check to anyone including the individual. They have used the fingerprint background check for people who have lived in multiple states. Contacting each state would be very time consuming and delay the ability to approve the care giver. Approximately 25 percent of the cases involve FBI background checks.

**SEN. WHEAT** further inquired about who paid for the service. **Ms. Seibenaler** maintained the fee was paid by either the facility or the employee.

**Closing by Sponsor:**

**SEN. MANGAN** remarked this bill is a small step to state licensing and regulation of irregular childcare facilities is important. **Mr. Crichton** was the best advocate for mandatory licensure when he claimed it was necessary to make sure there is good supervision, staff ratios, detailed work histories, etc. Many people who use drop-in childcare facilities have a false sense of security because they believe these facilities are licensed and regulated. They believe there are minimum standards in place and their child will receive quality childcare by a professional

watching their children when they can't. This is a minimal step to start addressing that issue. It is important for another step to be taken this session with either this bill or the other bill he is sponsoring.

#### HEARING ON SB 329

**Sponsor:** SEN. JEFF MANGAN, SD 23, GREAT FALLS and BLACK EAGLE

**Proponents:** Bill Slaughter, Director of the Department of Corrections  
Jim Oppedahl, Executive Director for the Montana Board of Crime Control  
Audrey Allums, Youth Justice Council  
Al Davis, Mental Health Association

**Opponents:** None

#### Opening Statement by Sponsor:

SEN. JEFF MANGAN, SD 23, GREAT FALLS and BLACK EAGLE, introduced SB 329. Before 1999, there were no provisions in statute in regard to juvenile detention officer training. There was no requirement that they receive juvenile specific training. The Juvenile Detention Center in Yellowstone County worked to create a juvenile specific curriculum. This was piloted with a two-year sunset provision. In 2001, the sunset provision was extended with the intention of expanding it to be included in the Law Enforcement Academy. Senate Bill 329 would make this a permanent provision in the statute. Those individuals and detention centers who want to utilize the juvenile specific training will be able to do so at the Law Enforcement Academy. It is not mandatory for everyone because some detention centers still want to use the basic training. A process has been set up for the training to occur on site in the facilities. Juvenile correction officers from the Department of Corrections in Pine Hills and Riverside wanted to be included in the law. This will give them the opportunity to focus specifically on juvenile issues in their training. This is permissive for the Department. There will be a fiscal note on this bill. They have identified some reverted federal funds to be utilized to set up training for the next biennium. It is less expensive to train the staff on-site with approved curriculum.

#### Proponents' Testimony:

Bill Slaughter, Director of the Department of Corrections (DOC), rose in support of SB 329. He remarked that juvenile detention

and correction facilities have expanded their growth in Montana for the past ten years. Currently there are eight county-operated juvenile centers, one private juvenile detention center and two juvenile correctional facilities. This bill would provide for the first juvenile specific correction and detention office basic training. He has learned juvenile specific training is absolutely essential for people who work with juveniles every day. Juvenile offenders have uniquely different needs and issues in comparison to adult offenders. Numerous individuals from across the state have worked very hard to develop a curriculum. Staff may be sent to the basic training or to the juvenile-specific training.

**Jim Oppedahl, Executive Director for the Montana Board of Crime Control**, stated the Board has been involved in the discussion of juvenile-specific training courses and supports the development and delivery of such training under the auspices of the Montana Law Enforcement Academy (MLEA). In June 2002, the Board approved the juvenile-specific course curriculum that was developed by the Ted Lechner Detention Center in Billings. The Board will meet this week to consider a grant proposal to fund the delivery of juvenile-specific training for the coming biennium.

**Audrey Allums, Youth Justice Council**, rose in support of SB 329.

*{Tape: 2; Side: A}*

**Al Davis, Mental Health Association**, remarked that in regard to juveniles there are differences in tolerance levels, mental health intervention, environmental issues, and physical and psychology issues. Over 50 percent of the youth entering the juvenile justice system have some serious emotional issues. Better training may divert juveniles from going into the deep end of the justice system.

**Opponents' Testimony: None**

**Questions from Committee Members and Responses:**

**SEN. MCGEE** asked the cost of the program and the state's responsibility once the federal grant is no longer available.

**SEN. MANGAN** explained the fiscal note has not been completed. The plan is to have a course every six months. The portability of the training is important in keeping the costs down. The fiscal note would not normally show the costs savings to Pine Hills, the DOC budget or the MLEA.



**Closing by Sponsor:**

**SEN. MANGAN** noted this concept has taken six years of hard work from people at the local level, the Board of Crime Control, the Youth Justice Council, the county commissioners, and the Juvenile Division of the Department of Corrections.

**EXECUTIVE ACTION ON SB 281**

**Motion:** **SEN. MCGEE** moved that SB 281 DO PASS.

**Discussion:**

**SEN. MCGEE** stated he deals with survey monuments in his line of work. If a survey monument is destroyed, it may cost several hundred dollars to replace. A section corner which controls multiple pieces of property, would cost thousands of dollars to replace. If all evidence is destroyed, it is replaced with a preponderance of evidence. In 1946, the federal government had interest in coal properties in the Bull Mountains. Because the surveys were inadequately prepared, there was full scale movement of section corners. It has cost the State of Montana thousands of dollars to reestablish section corner positions. When someone destroys a survey monument, this involves thousands of dollars. The state is split into four quadrants. The initial point is near Three Forks. The baseline runs east and west and this is not a straight line but an arc of latitude. This curve is very difficult to survey on the ground. Grand Avenue in Billings is the baseline. Recently two miles of Grand Avenue was torn up and this destroyed at least eight of the corners along the baseline. It will be difficult to replace these corners on the arc of a curve that is on the surface of the earth. Everything surveyed is on a straight line. If the monuments were not referenced before they were destroyed, it will take a surveyor thousands of dollars to replace those corners. Every person who owns property along King Avenue will have boundaries referenced to those corners which are currently destroyed.

**CHAIRMAN GRIMES** asked for clarification of the term survey "monuments". **SEN. MCGEE** explained a monument would usually be metal. It is defined in rule. This could be anything from a rebar which is two feet long with a surveyor's cap, a pipe monument would be two and half inches in diameter and 36 inches long with a brass cap, or a stone. The original government surveys used stones. In the Book of Deuteronomy the Lord says don't move people's boundaries.

**CHAIRMAN GRIMES** raised a concern in regard to unintentional destruction or damage of the survey monuments.

**Motion:** SEN. CROMLEY moved that SB 281 BE AMENDED, SB028101.avl, EXHIBIT(jus29a01).

**Discussion:**

SEN. O'NEIL questioned the situation where a licensed surveyor moved a monument to the wrong spot. SEN. MCGEE explained a registered surveyor could be taken before the board of registration. There would be another venue to address this issue.

SEN. WHEAT noted the bill was introduced due to one person's problem. There wasn't an overwhelming concern about survey monuments being moved. He recently built a home and the landscapers removed two corner stakes. With the amendment, he questioned whether (c) was necessary. It converts the action to a felony. It should follow along the lines of other acts of vandalism. Based on the costs involved, the prosecutor could determine whether it should be treated as a misdemeanor or a felony.

Ms. Lane stated she used the language in (c) and placed it into the definition of the offense. She did not change (c) but the intended penalties of \$1,000 and a jail term up to ten years did not fit into any existing penalties. Part of the testimony in support of the bill was that no one could point to a place in code which would make it clear that altering these monuments was actually a crime or was prohibited in any manner. It may be a good idea to remove (c).

**Substitute Motion:** SEN. O'NEIL made a substitute motion that SB 281 BE AMENDED.

**Discussion:**

SEN. O'NEIL suggested adopting SB028101.avl, striking (c) in its entirety and removing the underlined wording on lines 25 and 28, of page 1. Necessary changes in the title would also need to be made.

SEN. PERRY questioned what language in the bill made this act a felony. SEN. WHEAT explained it was the combination of the fine and the jail time. SEN. MCGEE added jail time of more than a year as well as being incarcerated at the state prison would constitute a felony. This is opposed to a year or less in a county jail.

SEN. MCGEE was not concerned about striking (c) but questioned whether the person could be charged per monument. Ms. Lane

didn't believe that was clarified in the bill. There is a provision for restitution in the criminal mischief section (2). The court is allowed to order someone to make restitution.

**Vote: Motion carried unanimously.**

**SEN. MCGEE** supported **SEN. O'NEIL's** amendment and also suggested another amendment to allow a prosecutor to charge this on a per monument basis.

**Substitute Motion: SEN. MCGEE made a substitute motion that SB 281 BE AMENDED.**

**Discussion:**

**SEN. CROMLEY** suggested changing the word "monuments" to "monument". This would make it clear that moving two survey monuments would result in two crimes. He questioned whether a survey monument would include a wooden stake. **SEN. MCGEE** claimed it would not. The monument would be the object itself to include a stone, a wood post, or a metal object that occupies the specific point of the corner. The corner exists and the monument is the object that occupies the corner position. The destruction of a wood stake, a lathe, or a fencepost would not destroy the monument.

***{Tape: 2; Side: B}***

**SEN. WHEAT** questioned who would own the monument. **SEN. MCGEE** explained that if two property owners have contiguous parcels of land and one property owner is defining the line between the property, both property owners would own the monument. If the monument refers to another parcel, it applies to all the parcels it may define. This is why a section corner is so critical. Township corners control interior sections.

**SEN. MCGEE** remarked that 70-22-103 stated a monument means an accessory that is presumed to occupy the exact position of a corner.

**Substitute Motion: SEN. MCGEE made a substitute motion that SB 281 BE AMENDED.**

**Discussion:**

**SEN. MCGEE** would place the word "a" after the word "moves" in amendment SB021801.av1. The word monuments would be changed to monument.

**Ms. Lane** suggested using the term "reference" monuments.

**SEN. MCGEE** accepted the suggestion as part of his motion.

**SEN. CROMLEY** raised a concern about the original intent of the bill if this was limited to the more permanent survey monuments.

**SEN. MCGEE** claimed the monuments could be covered with dirt, rocks and other debris but they can still be located. Knocking out the stakes that guard the monument is not a real loss. The discussion involves the destruction of the actual monument itself that is occupying the corner position. If a monument exists, that is the corner no matter how inaccurate the measurements were to get to the monument. If a monument is missing and its position can be reestablished from accessory evidence, this would be the next level of the preponderance of evidence.

**Vote:** Motion carried unanimously.

**Motion:** SEN. MCGEE moved that SB 281 DO PASS AS AMENDED.

**Discussion:**

**SEN. O'NEIL** noted that he has found survey stakes with a yellow plastic cap and the surveyor's name on it. This would not be a corner monument. He questioned whether the passage of this bill would make it illegal to move these stakes. **SEN. MCGEE** maintained if the monument had been recorded by a certificate of survey, corner recordation form, or a subdivision plat, the destruction of that monument would fall under this act. If a surveyor has set a random point, that would not be included.

**CHAIRMAN GRIMES** raised a concern that something may be inadvertently excluded in the bill. Since this is not a felony it would not rise to case law. He believed this would be starting a laundry list in the code. He questioned whether this one issue was serious enough to be mentioned in the code.

**SEN. WHEAT** believed that removing a survey monument was already covered in the code in the definition of tampering with someone else's property so that it would interfere with their use of that property, whether it is public or private property. **SEN. MCGEE** agreed that it may. He did not believe that an attorney would look to this code.

**SEN. WHEAT** remarked that an investigation would have found the responsible party. As an attorney, he would look to the criminal mischief section of the code.

**SEN. MCGEE** noted that God thought it necessary to mention this in his law.

**Vote:** Motion carried 7-2 with GRIMES and O'NEIL voting no.

**EXECUTIVE ACTION ON SB 283**

**Motion:** SEN. WHEAT moved that SB 283 DO PASS.

**Substitute Motion:** SEN. WHEAT made a substitute motion that SB 283 BE AMENDED, SB028302.avl **EXHIBIT**(jus29a02).

**Discussion:**

**Ms. Lane** commented that an earlier amendment reinserted the stricken language on page 2, line 23. She added SB028302.avl would change the title to read "An Act clarifying laws relating to venue in family law cases." The last phrase on lines 9-10 would be removed.

**{Tape: 3; Side: A}**

**Vote:** Motion carried unanimously.

**Motion:** SEN. WHEAT moved that SB 283 DO PASS AS AMENDED.

**Discussion:**

**SEN. O'NEIL** explained his amendment would address Section 1, (3). His amendment would state that the proper place to file an action brought pursuant to Title 40, chapter 4, is the county in which a petition is residing during the 90 days preceding the commencement of the action "or the county in which the respondent resides. Upon agreement of the parties, an action brought pursuant to Title 40, chapter 4, may be brought in any county."

**SEN. CROMLEY** stated the last sentence in the amendment is current law. The place of trial is venue and that may be waived. The first part of the amendment would be a small change in the law.

**SEN. WHEAT** remarked parties may agree to file a divorce case in another county. With regard to the part of the amendment which stated "or the county in which the respondent resides", the one who petitions the court is the one who decides venue. If the petitioner and respondent agree to file where the respondent resides, this is allowed. The problem with the amendment is that it would allow the respondent the opportunity to make a motion

why venue should be moved. It will probably generate more litigation.

**SEN. O'NEIL** noted case law would allow the venue to be placed either in the county of the petitioner or the respondent. The change made over existing case law, would allow an out-of-state person to use our courts.

**Motion:** **SEN. O'NEIL** moved that SB 283 BE AMENDED.

**Discussion:**

**SEN. WHEAT** believed the issue was more complex than the amendment would address. It may be necessary to draft different legislation to address the complexities involved with out-of-state jurisdictional lines.

**Vote:** Motion failed 1-8 with O'NEIL voting aye.

**CHAIRMAN GRIMES** asked for further clarification regarding the net effect of not allowing the agreement to be admissible. **SEN. WHEAT** explained it is universally accepted that if a mediation proceeding is held and the case is not resolved, referring back to the events of mediation is not allowed. The intent of the bill provides if a mediation proceeding is held in regard to a dissolution of marriage, the agreement reached would not be admissible unless it is reduced to writing and signed by the parties. In that instance, the parties should be able to rely on the document when finalizing their dissolution. The agreement could be affirmed by the counsel as well as the parties. If the party signed the agreement and later objected to it, it would still be admissible.

**Vote:** Motion carried unanimously.

**ADJOURNMENT**

Adjournment: 12:10 A.M.

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SEN. DUANE GRIMES, Chairman

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JUDY KEINTZ, Secretary

DG/JK

**EXHIBIT** (jus29aad)